Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 200

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES INC., SAN DIEGO GAS AND ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, CHAMPION INTERNATIONAL CORPORATION, WESTVACO CORPORATION, and WEYERHAUSER COMPANY

PETITIONERS

V.

CHEVRON U.S.A. INC.

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Philip P. Kalodner
Attorney of Record for Petitioners
208 Righters Mill Rd.
Gladwyne PA 19035
(610) 649-8749

67pgs

QUESTIONS PRESENTED FOR REVIEW

1. Has the practice of issuing unpublished decisions not citable as precedent been so misused here to avoid facing issues of first impression so as to require reversal?

2. Do the varying standards of the Courts of Appeals with regard to the use of unpublished opinions and their citation as precedent or for their persuasive effect require this Court's consideration as to the need for a uniform policy?

3. Has the refusal of the Court of Appeals for the Federal Circuit here to honor the language of prior decisions and its own repeated assurance that a private cause of action exists pursuant to the Economic Stabilization Act ("ESA") to recover for crude oil overcharges so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

4. Was the refusal of the Federal Circuit here to apply a specific federal statute of limitations for public enforcement actions pursuant to ESA Section 209 to private causes of action under ESA Section 210 for the same violations in conflict with the decisions of this Court?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the case contains the names of all of the parties.

International Paper Company, Westvaco Corporation and Weyerhauser Company are all themselves publicly owned corporations and have no parent corporation, nor is there any publicly held corporation which owns 10% or more of their stock.

Consolidated Edison Company of New York Inc. and Orange and Rockland Utilities Inc. are wholly owned subsidiaries of a publicly owned corporation, Consolidated Edison Inc.; San Diego Gas & Electric Company is a wholly owned subsidiary of a publicly held corporation, Sempera Energy; Champion International Corporation is a wholly owned subsidiary of International Paper Company. Long Island Lighting Company is a wholly owned subsidiary of Long Island Power Authority, a corporate municipal instrumentality of the State of New York.

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CITATION OF REPORTS OF OPINIONS

Neither the Decision of the Court of Appeals for the Federal Circuit nor the District Court Opinion is reported officially.

The Court of Appeals Decision is reported unofficially at 2002 U.S. Appeals LEXIS 7072 and at 32 Fed Appx. 588, and the denial of rehearing is unofficially reported at 2002 U.S. Appeals LEXIS 11815.

JURISDICTION

The Judgment sought to be reviewed was entered April 5, 2002.

A timely filed Petition for Rehearing was denied by Order entered May 13, 2002.

Jurisdiction of the Supreme Court is pursuant to 28 U.S.C. Sec. 1254.

STATUTES INVOLVED

The statutes involved, the pertinent text of which is set forth in the appendix are: Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (1971), Sections 209-211 (a) ("ESA"), Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 627 (1973), Sec. 5(a)(1) ("EPAA"), Petroleum

Overcharge Distribution and Restitution Act of 1986 ("PODRA"), Pub. L. 99-509, 100 Stat. 1884 (1986) 15 U.S.C. Sec. 4504, Federal Courts Administration Act of 1992, Sec. 102 (a)-(d), 106 Stat. 4506 (1992).

STATEMENT OF THE CASE

Plaintiffs, four electric utility companies ("Utilities") and four paper manufacturers ("Manufacturers") sought in this Complaint recovery for overcharges by defendant, Chevron U.S.A.Inc. ("Chevron"). They sought such on their own behalf and on behalf of similarly situated purchasers of petroleum products during the period of federal regulation of the price of crude oil (August 1973 through January 1981)

Utilities and Manufacturers averred that Chevron as a producer of crude oil had overcharged by recovering for price-controlled "old" oil as if it were price-uncontrolled "new oil," and that the plaintiffs and the class had paid a pro rata share of such overcharges. Relief was sought pursuant to Economic Stabilization Act ("ESA") Section 210 which provides for recovery in a private cause of action.

Jurisdiction of the District Court was pursuant to ESA Section 211 (a).

Judge Richard W. Roberts of the District Court for the District of

Columbia granted a Chevron motion to dismiss on two grounds, that (i) even if overcharged, the plaintiffs have no standing to sue because they had not purchased from Chevron directly, and (ii) the action is barred by the applicable statute of limitations.

An appeal was taken by Utilities and Manufacturers to the Court of Appeals for the Federal Circuit which, after briefing and oral argument, entered per curiam judgment with a single word decision, i.e. "Affirmed." and a legend "NOTE: Pursuant to Fed. Cir. R. 47.6 this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically." A petition for panel rehearing and for rehearing en banc was "Denied."

1. The Principal Elements of the Chevron Overcharge

Chevron's recertification of price controlled "old oil" as price-uncontrolled "new oil" was pursuant to a program authorized by the Department of Energy ("DOE") to encourage tertiary recovery, i.e. infusion in an oil field in order to recover additional oil. The program, known as the Tertiary Incentive Program ("TIP") permitted a producer of crude oil to increase to the world price crude oil which otherwise had a ceiling price. A

producer was permitted to so "recertify" a volume of ceiling price crude oil to the extent necessary to recover (i) 75% of its expenses and anticipated expenses in the TIP program it was implementing, and (ii) the additional federal Windfall Profits Tax and State Severance Taxes which would result from such a recertification and the resulting higher crude oil prices.

As to its January 1981 production, Chevron accordingly raised its prices on otherwise price-controlled oil sold to itself as a refiner in the amount of $205 million, representing such as within the TIP program authorized purposes.

The condition of the permission to increase crude prices was a requirement that to the extent such increase was either not justified initially or became unjustified by virtue of an abandonment of the TIP program before its completion, the amount of the unjustified increase was required to be returned to those who had paid it. In effect, to the extent the increase was unjustified, it was an overcharge, i.e. an unjustified avoidance of the ceiling price.

The Complaint here charges that in a number of important respects, the increase in the price of crude oil either initially was unjustified or became unjustified as a result of a premature abandonment of the

TIP Program and a recovery from the U.S. Treasury of a portion of the Windfall Profits Tax actually paid, and from the States of a portion of the Severance Tax which had been paid and used as a justification for the price increase.

2. The Impact of the Chevron Overcharges on the Plaintiffs and the Class

The increased price of crude oil recertified by a producer in order to implement a TIP Program was charged by it to the refiner purchasing its crude oil. Pursuant to DOE regulations, it was then passed on by the purchasing refiner to all other domestic refiners of crude oil pro rata, i.e. with each domestic refiner reflecting in its crude oil costs a percentage of the increased crude price calculated by a fraction, the numerator of which was the runs to stills of each refiner and the denominator of which was the runs to stills of all domestic refiners in the month involved.

The mechanism by which the cost of each refiner's crude oil was spread pro rata to all domestic refiners was the Entitlements Program promulgated by DOE's predecessor in 1974. (39 Fed. Reg. 42,246, formerly 10 CFR Sec. 211.67).

The Entitlements Program was adopted to equalize the acquisition cost of crude

oil to all refiners; without such equalization, some refiners would have had a lower crude cost by virtue of having a predominant supply of ceiling priced crude oil, while others would have a higher crude cost because of a predominant supply of unregulated imported crude.

In addition to spreading to all refiners the costs of each refiner, and indeed as a result of such spread, the Entitlements Program left all refiners with an approximately equal per gallon cost of crude oil.

Such equalization of the acquisition cost of crude oil had a further critical effect. As the Department of Energy's adjudicative body, the Office of Hearings and Appeals ("OHA") found on two separate occasions after hearing extensive expert testimony, it enabled refiners to pass on to their customers almost 95% of the increased acquisition cost of crude oil, absorbing only slightly more than 5% of the increased cost. (Report to the Court in In re The Department of Energy Stripper Well Exemption Litigation, ("Report in Stripper Well"), 7 Energy Mgmt. (CCH) par. 90,507; 341 Tract Unit of the Citronelle Field, ("341 Citronelle"), 24 DOE (CCH) par. 81,035 (OHA 1994).

As a result of this "pass through", the purchasers of refined oil products,

such as the Utilities and Manufacturers, paid to the refiners from whom they purchased product all increases in the acquisition cost of crude oil by any refiner, including such increases as were permitted by virtue of the adoption by any or all refiners of a TIP Program.

When, as was the case here, it was recognized that the TIP Program participant (i) had not indeed incurred some of the costs on the basis of which it had increased its crude oil prices (such as Windfall Profits Taxes never actually paid because of the Net Income Limitation) or (ii) later recovered some of the costs on the basis of which it had increased its crude oil prices (such as prepaid expenses and inventory and Windfall Profits Taxes and Severance Taxes paid), the increase in prices which the TIP participant had effectuated became to that extent overcharges which had effected all purchasers of refined product from all refiners to the same per gallon extent.

Neither the defendant here, nor the District Court, questioned the accuracy of the above explanation of the impact of overcharges by any producer on purchasers of product from all refiners. Indeed, it is the basis of OHA's unvarying practice in the case of recovery in a public enforcement action pursuant to ESA Section

209 of allocating to all purchasers of refined product recovered overcharges from any crude oil producer, regardless of whether their purchases were from the refiner who paid the overcharge initially or from a refiner who paid a pro rata share of the overcharge by virtue of the Entitlements Program.

Chevron's merit defense is that it never received the benefit of the $205 million recertification because the January 1981 Entitlements List was never implemented because of deregulation, and that accordingly it has no obligation to make restitution to the extent to which the recertification reflected overcharges. Utilities and Manufacturers maintain that (i) domestic refiners including Chevron did indeed recover in January 1981 sales the $205 million increase in price by Chevron, and (iii) Chevron either did receive or specifically waived the only portion of the $205 million to which it would have been entitled had the January Entitlements Program been implemented in the ordinary course, such having occurred in the settlement of In re The Department of Energy Stripper Well Exemption Litigation, ("Stripper Well") 653 F. Supp. 108 (D. Kan. 1986).

Chevron's pro rata share of crude oil refined by all domestic refiners was

8% (Final Settlement Agreement in Stripper Well, 7 Energy Mgmt (CCH) par. 90,509 at 90,680). Accordingly, if, as plaintiffs contend, the $205 million in Chevron's increased price was recovered in January, 1981 by domestic refiners, only 8% of it was recovered by Chevron itself, and 92% by other domestic refiners; Chevron would receive, and in plaintiffs' view did receive, the 92% recovered by other refiners in the implementation of the Entitlements Program (through the Stripper Well Settlement.)

If therefore, as the District Court apparently believed, ESA Section 210 permits only those who purchased directly from Chevron to recover, Chevron would be obligated to make restitution under ESA Sec. 210 only for 8% of its overcharges, rather than the 100% for which it would clearly be obligated to make restitution in a public ESA Sec. 209 action.

3. The Facts With Regard to the Statute of Limitations Issue

The instant Complaint was filed March 25, 1998, less than six years following the first public notice of the facts with regard to the alleged overcharges; that notice occurred as the result of a Federal Register Notice on May 13, 1992 that the DOE had, on March 26, 1992 issued a Proposed Remedial Order ("PRO") initiating

a public enforcement action against Chevron pursuant to ESA Section 209 (57 Fed. Reg. 20475).

(Plaintiffs were, by intervention, parties in the DOE public enforcement action, and filed the instant Complaint only after the DOE abandoned its enforcement action, and after plaintiffs' challenge to that abandonment was dismissed on the basis that the DOE's discretionary decision to drop the Section 209 enforcement action was not appealable by potential beneficiaries of that action. Consolidated Edison Co. of New York v. O'Leary, 131 F. 3d 1475 (Fed. Cir. 1997); had the DOE persisted in that public enforcement action and succeeded, in accordance with the ESA Section 209 mandate that funds recovered in a public enforcement action be used for "restitution", plaintiffs and the class would have recovered the amounts which they seek in the instant private action. In rejecting the plaintiffs' challenge to the abandonment of DOE's public enforcement action, the Federal Circuit pointed out that the Utilities and Manufacturers had available a private cause of action under ESA Section 210.)

Prior to the enactment of the Petroleum Overcharge Distribution and Restitution Act ("PODRA") October 21,

1986, 15 U.S.C.A. Section 4504, there was no limitation period specified in federal law for either Section 209 or Section 210 actions. The Courts imposed no limitation on Sec. 209 actions, and applied "the most closely analogous state statute of limitations," in Section 210 cases. Bond v. Texaco, 647 F. Supp 1135, 1137 (D.D.C. 1986). In doing so, in actions in the District of Columbia, "The District of Columbia recognizes the so-called discovery rule as to the inception of the limitations period, i.e. the cause of action accrues for limitation purposes not when the injury first occurred, but when the plaintiff discovered, or by the exercise of due diligence should have discovered, the facts giving rise to the claim." In Bond v. Texaco, the Court held that the limitations period began, at the earliest, at the time the DOE issued the then-equivalent of a PRO. id

PODRA provided for a six year limitation for public ESA Section 209 actions; it was silent as to Section 210 private actions. 15 U.S.C.A. Section 4504. Were the six year statute of limitations to be here applied to this Section 210 action and the "discovery rule" honored, all elements of the Chevron overcharge would be within the limitation period.

ARGUMENT

Here, a local rule permitting the Court of Appeals to issue unpublished dispositions not citable as precedent was grossly misused to affirm a District Court decision as to matters of first impression without binding the Court of Appeals to the precedential impact of such decisions.

The characterization of such an appellate determination as "not adding significantly to the body of law," the requisite under Federal Circuit Rule 47.6 for a non-precedential decision, is so unjustified as to suggest a denial of the right to appeal.

The misuse here of a rule permitting a non-precedential disposition (i) should be remedied, and (ii) provides a needed opportunity for this Court to review the use of similar rules by the various federal Courts of Appeals.

This Court should preclude such non-precedential disposition rules, inter alia (i) because they eliminate the discipline to decide cases on a consistent basis which is imposed by the precedential implications of Courts of Appeals' dispositions, (ii) because of the variance in the rules of the various Circuits with regard to the persuasive impact of unpublished dispositions , and (iii)

because of the significant variance in the use of such rules by the various Circuits.

I THE PRACTICE OF ISSUING UNPUBLISHED DECISIONS NOT CITABLE AS PRECEDENT HAS BEEN SO MISUSED HERE TO AVOID MAKING A CITABLE DECISION ON MATTERS OF FIRST IMPRESSION AS TO REQUIRE REVERSAL

The District Court here faced, and decided, whether knowingly or not, two issues of first impression in private actions pursuant to ESA Section 210 to recover crude oil overcharges:

(i) whether there is indeed a private cause of a action to recover crude oil overcharges passed through all refiners, or whether the provision for a private cause of action pursuant to ESA Section 210 is ineffective to provide such, and

(ii) whether, in light of the creation in PODRA, 15 U.S.C. Sec. 4504, of a 6 year limitation period for parallel public enforcement actions pursuant to ESA Sec. 209, it is appropriate to adopt the same 6 year limitation period for private actions under ESA Sec. 210.

By affirming the District Court decision, the Court of Appeals has presumably affirmed either or both the District Court holdings, i.e. (i) that the private cause of action supposedly

provided by ESA Section 210 is a toothless tiger because end users of oil products injured by crude oil overcharges passed on to the refiner from whom they purchased product cannot recover from the crude oil producer who overcharged, and (ii) that the private cause of action provided by ESA Section 210 is available only within a state limitation period shorter than that available in the supposedly parallel ESA Section 209 public enforcement action. In the absence of a Court of Appeals opinion, it is not possible to determine whether the Court of Appeals agreed with the District Court as to both holdings, or only as to one, and if only as to one, to which one. It is likely that the Court of Appeals affirmed at least on the first of these two holdings (i) in light of the fact that it was this issue to which the questions on oral argument were directed, and (ii) in light of the fact that elimination of the six year limitation period alone would not have provided a basis for dismissal of the Complaint; at least one of the elements of violation occurred within the three year District of Columbia limitation period.

A. <u>There Can Be No Doubt That Both Issues Were Matters of First Impression.</u>

1. <u>No Court, other than the District Court here, has construed the "overcharge</u>

Court here, has construed the "overcharge the plaintiff" language of ESA Section 210 with regard to crude oil overcharges

The District Court here interpreted the Sec. 210 requirement that a private cause of action is available only "against any person renting property or selling goods or services who is found to have overcharged the plaintiff" as permitting suit only by "direct purchasers of Chevron's crude oil." (Appendix, p. 9a).

If literally applied, such an interpretation would preclude any action to recover crude oil overcharges by private purchasers of refined product to which, as OHA has found, 95% of the increased price of crude oil was passed through, because the direct purchaser of Chevron's crude was Chevron itself. But even if, as the Court would presumably hold, direct purchasers from Chevron as a refiner were permitted to seek recovery for the affect on them of the Chevron crude oil price increases, purchasers of only 8% of the product affected would be entitled to recover, inasmuch as Chevron sold only 8% of the product which had been uniformly affected by the additional charges, with the balance being borne on product sold by other domestic refiners.

Because no Court has ever faced the issue of interpreting the statutory

District Court relied on the interpretation of the language in connection with what are generally referred to as "refined product" cases.

Refined product violations are violations by refiners, resellers or retailers as to refined product. e.g. gasoline, home heating oil, residual fuel oil etc., and affect only the customers of the particular refiner, reseller or retailer. For example, if a refiner sets a price of gasoline in excess of the applicable ceiling price and then sells the gasoline, the only persons possibly affected are the reseller, retailer and end user customers purchasing such. I n contrast, crude oil violations are violations of the regulations by either a producer of crude oil or a reseller of crude oil. Because of the Entitlements Program, regardless of which refiner initially purchases the crude oil, any higher price is borne by all domestic U.S. refiners in proportion to their percentage of national refinery production.

Moreover, because the Entitlements Program leaves all refiners with essentially the same acquisition cost of crude oil, and because the cost of crude oil is the overwhelmingly important component cost of refined product, as OHA has found, the market price of refined oil

products reflected 95% of the essentially uniform crude oil cost to all refiners, so that 95% of the crude oil overcharge was borne by the purchasers of the refined product made with such crude oil.

In the refined product cases, the Courts have interpreted the Sec. 210 language permitting its use only against persons "found to have overcharged the plaintiff" as permitting suit only against the immediate seller and have denied the right of a purchaser to sue a remote seller, albeit recognizing that if there was a cost-plus contract requiring pass-through (Arnson v. General Motors Corporation, 377 F. Supp. 209 (N.D. Ohio 1974)), a situation in which the impact of overcharges on a "remote" purchaser could be determinable in advance (Gulf Oil Corp. v. Dyke, 734 F. 2d 797, 809 (TECA 1984) or the functional equivalent of a cost-plus contract (Eastern Air Lines Inc. v. Atlantic Richfield Co., 609 F. 2d 497, 498 (TECA 1979), pass-through can be recognized.

No court has faced or dealt with an assertion in a Section 210 case involving crude oil overcharges, as here made by plaintiffs, that the Entitlements Program was in fact the "functional equivalent" of a cost-plus contract; it automatically passed on the overcharges by any producer

to all refiners, and by virtue of equalizing the acquisition cost of crude oil to all refiners, assured that any overcharge would (to the extent of some 95%) be passed on to end user purchasers. The Entitlements Program met the requirements for functional equivalence to a cost-plus contract because, (i) unlike the situation in Eastern Air Lines, it was "pre-existing", i.e. it existed before the recertification (rather than requiring approval of an administrative agency, as in Eastern Air Lines), and (ii) unlike the situation in Gulf Oil, the essentially 100% nature of the pass-through was "capable of determination in advance" (rather than requiring a case-by-case determination as to whether the competitive market situation was one in which the overcharged party was able to pass-through, as in Gulf Oil).

2. No Court, other than the District Court here, has examined the issue of whether the adoption in 1986 of a six year statute of limitations for public enforcement actions requires re-examination of the employment of state limitation statutes in parallel private enforcement actions and the adoption of a six year statute.

In the period from the enactment of ESA Sections 209 and 210 in 1971 and until

the enactment of PODRA in 1986, there was no limitation period set forth in the statute either for Section 209 or 210 actions. The Courts treated Sec. 209 actions seeking either "injunctive relief" or "restitution" as equitable actions not subject to any statute of limitations, Citronelle-Mobile Gathering Inc. v. Edwards, 669 F. 2d 717, 721 (TECA 1982), cert. denied 459 U.S. 877 (1982), and "borrowed" state limitation periods as to ESA Section 210 actions seeking to recover the amount of "overcharge", characterizing them as legal in nature. The distinction made sense prior to the termination of price regulation in January, 1981 when the DOE pursuant to Section 209 could either seek to enjoin the alleged illegal pricing or could seek restitution by requiring the violator to adjust its future prices so as to refund the overcharge to its customers. But with the end of regulation, an enforcement action for restitution sought the exact same damages as would be sought in a private Section 210 action; the only difference was that in a Section 209 action, the recovery went initially to the DOE, and then by disbursement to the injured end users, while in a Section 210 action the very same recovery went to the end user plaintiffs directly. The proof of the identity of the two actions here is

demonstrated by the fact that the items of recovery sought by the DOE in its abandoned Section 209 action against Chevron are precisely the same as that sought in the instant Section 210 action.

Congress recognized this conversion of what had been equitable actions under Section 209 into actions for damages by specifying a 6 year limitation period in PODRA (15 U.S.C. Section 4504); its failure to specify the same limitation period for Section 210 actions presumably reflected a view that such actions were unlikely to be brought, both (i) because it had been five years since deregulation, and (ii) because of an assumption that DOE would vigorously prosecute Section 209 actions and that the same recoveries would thereby be available to end users.

The use of state limitations for Section 210 actions was never very satisfactory, as attested to by the struggles which the courts had in determining (i) which States' statute to apply (e.g. Kellermyer v. Blue Flame Gas Corp., 797 F. 2d 983 (TECA 1986), Gulf Oil v. Dyke, supra), (ii) which of the limitation periods of the State to apply (e.g. Sousa v. BP Oil Inc., 1995 WL 842003 (D. Mass. 1995), and (iii) whether, in light of the provision permitting treble damages in Section 210 actions, to apply a

penal or a "compensatory" limitation period, or both (e.g. Sinclair Oil Corp. v. Atlantic Richfield Co., 720 F. Supp. 894, 905-6 (D. Utah 1989), Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F. 2d 984, 991 (TECA 1977).

No Court, to the best of Petitioners' knowledge, has yet considered whether the six year period specified for 209 actions in PODRA, 15 U.S.C.A. Sec. 4504, enacted October 21, 1986, is now properly applied to 210 actions, at least those involving crude oil overcharges where, by virtue of the Entitlements Program, the impact of the alleged overcharges necessarily affect every purchaser in every state.

B. By Barring the Citation of Its Disposition As Precedent, The Federal Circuit Has Either (i) Decided an Issue of First Impression, But Refuses to Take Responsibility for Doing So, Or (ii) Has Decided The Case On Some Basis Other Than The Issues Presented; In Either Case, There Has Been An Effective Denial of The Right to Appeal

If the Federal Circuit did indeed decide one or both of the issues of first impression before the Court, it misused its own rule, and indeed, the purported justification for un-published, non-citable decisions as promulgated by the various Courts of Appeals, i.e. that, as

Federal Circuit Rule 47.6 puts it, the decision is not one "adding significantly to the body of law." (Indeed, in the Court of Appeals for the District of Columbia Circuit, the standards require publication of an opinion in a "case of first impression," the necessary inference being that in such cases there should be a written opinion, D.C. Circuit Rule 36.)

If, on the other hand, the Federal Circuit decided the case on some other basis, e.g. that despite the statutory provision permitting an independent private cause of action, it will not permit such where DOE has determined not to complete a public enforcement action, it has violated the rule of law.

In either event, the Court has avoided the discipline which stems from the precedential effect of a decision.

II THE "CANNOT BE CITED" RULES OF THE CIRCUITS VARY WIDELY, WITH AT LEAST FIVE COURTS PERMITTING THE CITATION OF UNPUBLISHED OPINIONS; MOREOVER, THERE ARE INDICATIONS THAT THE USE OF UNPUBLISHED "NON-CITABLE" OPINIONS VARY WIDELY AS AMONG THE CIRCUITS; THE EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED TO OBTAIN UNIFORMITY

The rules of the various Circuits

vary widely as to the standards for publication. Thus, for example, the First Circuit explicitly provides a preference for publication, Rule 36, while other Circuits do not, and the D.C. Circuit rules suggest that there be opinions written and published in cases of first impression, Rule 36, while others do not.

Moreover, a recent study comparing the percentage of decisions published in the Eighth and Tenth Circuits during the first six months of the year 2000 shows a 44% publication rate in the Eighth Circuit and a 21% publication rate in the Tenth Circuit. The study suggests clearly different criteria for publication in the two Circuits studied. ("'Unpublished' Opinions as the Bulk of the Iceberg..." Law Library Journal, Vol. 93:4 p. 589 et seq.)

With regard to the citation of unpublished decisions, at least five of the Circuits permit the citation of unpublished decisions, (i) for their "persuasive" effect (Fifth Circuit Rule 47.5.4 and Tenth Circuit Rule 36.3), (ii) because a party believes the unpublished decision has "precedential value" (Sixth Circuit, Rule 28 (g), and Fourth Circuit Rule 36 (c)), and (ii) in the case of the District of Columbia Circuit, after January 1, 2002, unpublished decisions

"may be cited as precedent" (Rule 28).

In contrast, the Federal Circuit has adopted the more restrictive rule, precluding citation of any opinion or order designated not to be cited as precedent. (Federal Circuit Rule 47.6.)

It would seem self-evident that a rule which precludes citation is less likely to insure judicial self-discipline than rules which provide that dispositions can be cited as either precedential or persuasive.

Even if non-publication is justified, it is hard to see any justification for precluding the citing of such decisions, particularly in the current era when "unpublished" opinions are in fact widely and generally available.

In essence, the "non-citation" rule of the Federal Circuit has converted an appeal process into a certiorari process, with the Court not bound by its own determinations. Such significantly impinges on the right to appeal which Congress clearly recognized in providing for appeal to the Federal Circuit as a matter of right, ESA Section 211.

III THE EMASCULATION OF THE PRIVATE CAUSE OF ACTION UNDER ESA SECTION 210 IN CRUDE OIL OVERCHARGE CASES IS (i) INCONSISTENT WITH REFINED PRODUCT DECISIONS OF TECA,

AND (ii) INCONSISTENT WITH THE FEDERAL CIRCUIT AND TECA'S REPEATED ASSURANCE OF THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION

Although the issue of the extent of the availability of ESA Section 210 to recover crude oil overcharges is, as above noted, a matter of first impression, two lines of decisions provide compelling reasons for the reversal of the District Court determination that those injured by crude oil overcharges through the mechanism of the Entitlements Program are without the standing to bring a private cause of action under Section 210.

A. TECA, the Federal Circuit's predecessor (whose decisions it recognizes as precedent) repeatedly recognized in refined product cases that had there been a cost plus contract or its functional equivalent, it would have permitted the offensive or defensive use of "passing-on"

In Gulf Oil Corp. v. Dyke, supra, 734 F. 2d at 809, TECA articulated the principle that the passing on of overcharges is properly recognized where it occurred pursuant to a "pre-existing functional equivalent of a cost-plus contract" (i) pursuant to which the immediate purchaser from the overcharger "would necessarily pass through any overcharge received", and (ii) by virtue

of which "the effect of the overcharge to...(the remote purchaser) must be capable of determination in advance," quoting its prior decision in Eastern Airlines v. Atlantic Richfield Co., 609 F. 2d 497, 498 (TECA 1979). 734 F. 2d at 809.

Plaintiffs here have alleged in their Complaint the facts that establish that the DOE's Entitlement Program was the "functional equivalent of a cost-plus contract", and that the "effect of the overcharge...(on plaintiffs was) capable of determination in advance," thus meeting the requirement as set forth in Gulf Oil Corp. v. Dyke. for an "indirect purchaser" to recover overcharges by a remote producer.

B. The Federal Circuit (and TECA before it) have repeatedly relied on the availability of a private cause of action under ESA Section 210 to recover crude oil overcharges as the basis for denying these same Utilities and Manufacturers the right to challenge the actions of DOE in ESA Section 209 public enforcement proceedings

In Consolidated Edison Co. of New York v. O'Leary, 131 F. 3d 1475 (Fed. Cir. 1997), the Federal Circuit denied an appeal by essentially the same Utilities and Manufacturers from the dismissal by OHA of an ESA Section 209 public enforcement action initiated by the

Secretary of Energy's enforcement arm against Chevron for the same alleged oil overcharges which are the subject of the instant action. In doing so, the Court relied extensively on the availability of the alternative remedy provided by ESA Section 210 pursuant to which the Utilities and Manufacturers could seek the same recoveries directly in a private cause of action. To the same effect, see Consolidated Edison Co. of New York v. O'Leary, 117 F. 3d 538, 544 (Fed. Cir. 1997) ("If plaintiffs have been injured by (crude oil) overcharges, Congress created a generous private remedy for private litigants in Section 210"); Getty Oil Co. v. Department of Energy, 865 F. 2d 270, 275 (TECA 1988) ("Since private would-be intervenors (in a Section 209 proceeding involving crude oil overcharges) are afforded a statutory remedy under Section 210 to recover over-charges, they may not intervene in DOE's enforcement...").

IV DECISIONS OF THIS COURT REQUIRE THE UTILIZATION OF THE LIMITATION PERIOD SPECIFIED FOR ESA SECTION 209 ACTIONS FOR PRIVATE ACTIONS PURSUANT TO ESA SECTION 210 TO RECOVER CRUDE OIL OVERCHARGES

As this Court has noted, although the state-borrowing doctrine may not be

lightly abandoned, the borrowing of a federal statute of limitations may be appropriate "when a rule from elsewhere in federal law provides a closer analogy then available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking". Reed v. United Transportation Union, 488 U.S. 319, 324, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), quoting DelCostello v. Teamsters, 462 U.S. 151, 172, 76 L.Ed. 2d 476, 103 S.Ct. 2281 (1983).

In Lampf v. Gilbertson, 501 U.S. 350, 356-8, 115 L. Ed. 2d 321, 111 S.Ct. 2773 (1991), this Court suggested "a hierarchial inquiry for ascertaining the appropriate limitations period for a federal cause of action where Congress has not set the time within which such an action must be brought."

All three of the determinations outlined by the Court in Lampf here support the selection of the federal six year limitation period:

(i) because of the part contract, part penalty nature of the cause of action, reference to state limitation periods results in uncertainty as to the applicable limitation period, with some courts selecting a contract limitation

period, some a penalty limitation period, and some a "catch-all" limitation period, see e.g. Bond v. Texaco, Inc., supra, 647 F. Supp. at 1138; the result is inconsistency and lack of predictability;

(ii) "the geographic nature of the claim" i.e. that in a crude oil overcharge situation, because of the Entitlements Program, the injury to consumers occurred in all of the States; the result of reference to State limitation periods "would present the danger of forum shopping" as well as the complexity of a State determining whether it should look to a State of violation and if so, to what other State (See also Agency Holding Corp. v. Malley-Duff & Associates Inc., 483 U.S. 143, 154 (1987));

and (iii) "an analogous federal source truly affords a 'closer fit' with the cause of action than does any available state-law source." It is hard to imagine a closer fit than the parallel public enforcement action under ESA Section 209.

In Lampf v. Gilbertson, 501 U.S. 350, 357 (1981), the Court rejected reference to a state statute of limitations for private causes of action brought pursuant to Section 10b of the Securities Exchange Act of 1934 and utilized the federal

limitations period provided for public enforcement actions under that Act, a situation remarkably close to the one presented here.

The Court in Lampf v. Gilbertson identifies the relevant factors in determining whether the federal source affords a "closer fit" as "commonality of purpose and similarity of elements" (501 U.S. at 358). The purpose of Section 209 in the post-regulatory period is the same as of Section 210, i.e. the recovery of overcharges and their restitution to those injured, and the elements of the damage claim are precisely the same. A "closer fit" could hardly be imagined.

CONCLUSION

For the reasons above stated, a writ of certiorari should be granted.

Respectfully submitted,

Philip P. Kalodner
208 Righters Mill Rd.
Gladwyne PA 19035
(610) 649-8749

Attorney for Petitioners

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals
For the Federal Circuit

01-1565

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, INC., SAN DIEGO GAS & ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, CHAMPION INTERNATIONAL CORPORATION, WESTVACO CORPORATION, and WEYERHAUSER COMPANY,

Plaintiffs-Appellants,

v.

CHEVRON U.S.A., INC.

Defendant-Appellee.

Judgment

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In CASE NO(S) 98-CV-764

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam: (MAYER, Chief Judge, RADER and DYK, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: April 5, 2002

_____

Jan Horbaly, Clerk

United States Court of Appeals
For the Federal Circuit

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 20, 2002.

FOR THE COURT

Jan Horbaly
Clerk

Dated: May 13, 2002 Filed: May, 13, 2002

cc: Philip P. Kalodner
Robert M. Westberg

CONSOLIDATED EDISON V CHEVRON, 01-1565
(DCT – 98-CV-764)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No.**
	)	**98-0764 (RWR)**
CHEVRON U.S.A., INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs sued Chevron U.S.A., Inc. ("Chevron") under section 210 of the Economic Stabilization Act (ESA"),[1] for damages based on Chevron's alleged

[1] Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (codified at 12 U.S.C. § 1904 note (continued)

overcharges for crude oil. Chevron has moved to dismiss plaintiffs' complaint, asserting that plaintiffs lack standing, that their claim is barred by the applicable statute of limitations, and the plaintiffs' allegations fail to state a claim for relief under section 210. Because plaintiffs lack standing and, alternatively, because plaintiffs' claim is barred by the applicable statute of limitations, the complaint will be dismissed.[2]

(1976)), as incorporated in the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. 93-159, 87 Stat. 627 (codified at 14 U.S.C. §§ 751-760h (1982)). Section 210 of the ESA provides a private right of action to any "person suffering legal wrong because of any act or practice arising out of the [ESA or EPAA] or any order or regulation issued pursuant thereto." See Consolidated Edison v. O'Leary, 131 F. 3d 1475, 1478 (D.C. Cir. 1997).

[2] Having concluded that plaintiffs do not have standing to bring this section 210 claim against Chevron and, alternatively, that the section 210 claim is time-barred, the Court need not address the Rule 12 (b) (6) motion to dismiss for failure to state a claim for relief under section 210.

BACKGROUND

The Economic Regulatory Administration ("ERA"), an office in the Department of Energy ("DOE"), was responsible for enforcing the mandatory price and allocation regulations issued by the DOE under the EPAA and the ESA. The ERA would investigate alleged EPAA violations and issue proposed remedial orders ("PROS") to firms or individuals believed to have engaged in those violations. If the recipient of a PRO contested the allegation of a violation, it could obtain an evidentiary hearing before the Office of Hearings and Appeals ("OHA"), the office with the authority to evaluate PROs and determine whether the remedial order should be issued.

In March 1992, the ERA issued a PRO to Chevron. The PRO, which was published in the Federal Register in May 1992, alleged that during the period of petroleum price controls ending in 1981, Chevron had received excess revenue from the DOE's Tertiary Incentive Program ("TIP") and that Chevron should be required to disgorge the excess revenue.[3] Chevron contested the PRO and, after briefing and

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[3] Under the TIP, "oil producers were eligible for financial benefits if they engaged in tertiary recovery projects, i.e., projects using methods such as thermal, chemical, or miscible gas processes to recover crude oil that could not be (continued)

an evidentiary hearing, the OHA concluded that the PRO issued to Chevron could not be sustained and that no remedial order should be issued to Chevron.[4]

The same companies who are plaintiffs in this case, with the sole exception of Westvaco Corporation ("Westvaco"), challenged the OHA's decision by filing a lawsuit in this district court seeking to compel DOE to issue a remedial order. See Consolidated Edison Company of New York, et al., v. O'Leary, Civil Action No. 96-1149 (TPJ). United States District Judge Thomas Penfield Jackson held that plaintiffs as private parties lacked standing to challenge the results of public enforcement proceedings, and he dismissed that lawsuit. See Memorandum and Order entered January 13, 1997, Exh. 1 to Chevron's Reply ("Jackson Opinion"). Judge Jackson's decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit. See Consolidated Edison v. O'Leary, 131 F. 3d 1475 (D.C. Cir. 1997). Plaintiffs, now joined by Westvaco, then

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recovery techniques." See Consolidated Edison, 131 F. 3d at 1477.

[4] The OHA's decision is not binding in this proceeding. "[A]n enforcment proceeding under section 209 is neither a prerequisite nor a bar to a private action under section 210." See Consolidated Edison, 131 F. 3d at 1478.

(D.C. Cir. 1997). Plaintiffs, now joined by Westvaco, then filed this lawsuit under section 210, and defendant moved to dismiss.

DISCUSSION

I. STANDING

Defendant argues that plaintiffs do not have standing to sue under section 210 because plaintiffs were not direct purchasers of Chevron's crude oil. "Section 210 (b) of the ESA authorizes suits for overcharges ' . . . against any person renting or selling goods or services who is found to have overcharged the plaintiff.'" Gulf Oil Corp. v. Dyke, 734 F.2d 797, 807 (Temp. Emer. Ct. App. 1984). An indirect purchaser has no standing to sue under section 210. Id.; see also Stertz v. Gulf Oil Corp., 685 F.2d, 1367, 1369 n.3 (Temp. Emer. Ct. App. 1981); Bond v. Texaco, Inc., 647 F. Supp. 1135, 1137 (D.D.C. 1986).

Plaintiffs in this case were indirect purchasers. Indeed, plaintiffs admitted as much in their prior lawsuit before Judge Jackson. See Jackson Opinion, at 3 n.2 ("Plaintiffs contend that, as indirect purchasers of Chevron's products, they have no right of action under ESA § 210"). Although it is undisputed that plaintiffs purchased refined product from domestic refiners, plaintiffs now argue that they

Chevron because "every refiner [is] an agent of the overcharging producer." See Plaintiff's Response, at 40. Plaintiffs cite no factual basis or legal authority for their current position, which is clearly inconsistent with the position they took before Judge Jackson. Plaintiffs' argument that they should be deemed direct purchasers with standing under section 210 is without merit.

Plaintiffs also argue that they should be allowed to sue Chevron under section 210 even if they were indirect purchasers. Plaintiffs assert that none of the reported cases holding that only direct purchasers have standing under section 210 involved purchasers or crude oil. Plaintiffs cite no case law which holds that indirect purchasers of crude oil have standing under section 210. Indeed, the Temporary Emergency Court of Appeals note in a case involving crude oil purchases that only direct purchasers have standing to sue under section 210. See Stertz v. Gulf Oil Corp., 783, F.2d 1064, 1066 n.2 (Temp. Emer. Ct. App. 1986).

The law is well-established that, as indirect purchasers, plaintiffs lack standing to sue Chevron under section 210. Plaintiffs' arguments to the contrary are unsupported by legal precedent and are unpersuasive.

II. STATUE OF LIMITATIONS

"Because the ESA [and] EPAA . . . do not contain specific statutes of limitation, [the court] must apply the most

closely analogous state of statute of limitations to causes of action arising under the Acts." Gulf Oil Corp. v. Dyke, 734 F.2d at 807 (citing Ashland Oil Co. of California v. Union Oil Co. of California, 567 F.2d 984 (Temp. Emer. Ct. App. 1977)). The statute of limitations for section 210 lawsuits in the District of Columbia is, at most, three years. See Bond, 647 F. Supp. At 1138 (§ 210 actions most analogous to actions for a statutory penalty or forfeiture, actions on a simple express or implied contract, or actions for which a limitation is not otherwise specially prescribed).

Notwithstanding clear legal authority that the most analogous state statue of limitations governs section 210 cases, plaintiffs argue that the six-year statute of limitations for suits by the DOE under the Petroleum Overcharge Distribution and Restitution Act ("PODRA"), 15 U.S.C. § 4501 *et seq*., should apply. Plaintiffs present no case law or other legal authority to support their argument that the PODRA statute of limitations should apply to a section 210 lawsuit. Instead, plaintiffs argue that no court has decided whether the six-year statue of limitations from PODRA should apply. See Plaintiffs' Response, at 44. Although it may be accurate that no court has specifically addressed whether PODRA's statute of limitations should apply to a section 210 action, federal courts have continued to apply the most analogous state statute of limitations since PODRA was enacted in October 1986. See Ashland Oil Co. v. Cotton Petroleum Corp., 808 F.2d 62, 63 (Temp. Emer. Ct. App.

1986) (decided in December 1986); Stertz v. Gulf Oil Corp., 1988 WL 83188, *2 (E.D.N.Y. 1988).

Additionally, "one of the goals of the national energy policy [is] 'to wind up regulation of the oil industry . . . .'" Kellermyer v. Blue Flame Gas Corp., 797 F.2d 983, 985 (Temp. Emer. Ct. App. 1986) (quoting Johnson Oil Co. v. Dept. of Energy, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982)). Based on the national energy policy, the court in Kellermyer held that a longer statue of limitations "would be much more likely to frustrate the clearly expressed goals of the federal statute than would the more restrictive [statue of limitations]." Kellermyer, 797 F.2d at 986.

Plaintiffs also argue that, even if the three-year statute of limitations applies, they were not aware of the precise breakdown between principal and interest of Chevron's Windfall Profits Tax recoveries until less than three years before they filed this lawsuit. Plaintiffs concede that the PRO included sufficient information regarding the amounts of prepaid expenses and severance tax refunds claimed by plaintiffs in this case as overcharges. The PRO also informed plaintiffs that the ERA proposed over $94 million as an increase in tertiary incentive revenue, a decrease of over $51 million in recoverable allowed expense, and a proposed restitutionary penalty of $125 million.

Plaintiffs received additional information when the OHA published an interlocutory order in August 1993 which detailed an $84 million windfall profit tax credit taken by

Chevron in 1983084. The interlocutory order was published to the public and was not subject to confidentiality or other restrictions.

"The District of Columbia recognizes the so-called 'discovery' rule as to the inception of the limitations period, i.e., the cause of action accrues for limitations purposes not when the injury first occurred, but when the plaintiff discovered, or by the exercise of due diligence should have discovered, the facts giving rise to a claim." Bond, 647 F. Supp. at 1139 (citing Kelton v. District of Columbia, 413 A.2d 919, 921 (D.C. 1980); Dawson v. Eli Lilly & Co., 543 F. Supp. 1330, 1333 (D.D.C. 1982)). As was the case in Bond, plaintiffs in this case had sufficient knowledge of the facts giving rise to their section 210 claim by no later than the publication of the August 1993 interlocutory order. Because plaintiffs did not file this lawsuit until more than three years later, their claim is time-barred and must be dismissed.[5]

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[5] Plaintiffs argue that they could not have filed their lawsuit until they knew the allocation of principal and interest for each element of their overcharge claim because a plaintiff is required to plead a "sum certain" for the alleged overcharge, citing Dempsey v. Rhodes Oil Co., 620 F.2d 274 (Temp. Emer. Ct. App. 1980). Plaintiffs' reliance on Dempsey is misplaced. In Dempsey, the court specifically excepted from (continued)

CONCLUSION

Plaintiffs are indirect purchasers of Chevron's products and, as a result, do not have standing under section 210. Even if plaintiffs had standing under section 210, their claim would be barred by the three-year statute of limitations. Defendant's motion to dismiss will be granted by the accompanying final order.

SIGNED this 5th day of July, 2001.

RICHARD W. ROBERTS
United States District Judge

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the "sum certain" rule the situation in which "the seller has information necessary to a determination of the total overcharge, and this information is not available to the buyer." Id. At 277. To the extent that plaintiffs allege they were unable to obtain certain information regarding elements of the total overcharge, plaintiffs would benefit from the Dempesy exception to the "sum certain" rule and, therefore, would have been able to file their section 210 claim based on the information they had in August 1993.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 98-0764 (RWR)**
CHEVRON U.S.A., INC.,	)	
Defendant.	)	

FINAL ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERD that defendant Chevron U.S.A., Inc.'s Motion to Dismiss [6] be, and hereby is, **GRANTED.**

This is a final appealable order

SIGNED this 5th day of July, 2001.

RICHARD W. ROBERTS
United States District Judge

"Sec. 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"Sec. 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund or the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

(c) For the purposes of this section, the term "overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"Sec. 211. Judicial review

"(a) The district courts or the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

Sec. 5(a) (1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated , such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

PETROLEUM OVERCHARGE DISTRIBUTION AND RESTITUTION ACT OF 1986

§ 4504. Statute of limitation

(a) In general

(1) Except as provided in subsection (b) of this section, the commencement of a civil enforcement action shall be barred unless such action is commenced before the later of—

(A) September 30, 1988; or

(B) six years after the date of the violation upon which the action is based.

(2) For purposes of paragraph (1), the term "commencement of a civil enforcement action" means—

(A) the signing and issuance of a proposed remedial order against any person for filing with the Office of Hearings and Appeals of the Department of Energy; or

(B) the filing of a complaint with the appropriate district court of the United States.

(3) For purposes of this section, the term "civil enforcement action" means an administrative or judicial civil action by the Secretary under the Emergency Petroleum Allocation Act of 1973 [15 U.S.C.A. § 751 et seq.] or the Economic Stabilization Act of 1970 (or the regulations issued thereunder) for the enforcement of any violation of such Acts or regulations.

(b) Exceptions

(1) In computing the periods established in subparagraphs (A) and (B) of subsection (a)(1) of this section, there shall be excluded any period—

(A) during which any person who is or may become the subject of a civil enforcement action is outside the United States, has absconded or concealed himself, or is not subject to legal process;

(B) during which facts material to the establishment and maintenance of a civil enforcement action could not be known;

(C) occurring before full compliance with any subpoena or special report order issued to any person under section 772 of this title, and such additional period (not to exceed 12 calendar months) after such compliance for the Secretary to consider the results thereof and commence a civil enforcement action;

(D) during the pendency of any relevant criminal action under the Acts or regulations described in subsection (a)(1) of this section during which a civil enforcement action is held in abeyance as a result of prosecutorial discretion and with or without a stay, and such additional period (not to exceed 12 calendar months) after a final judicial order or dismissal of such criminal action to commence a civil enforcement action;

(E) before the issuance of an order that constitutes final agency action on a request for adjustment from any

rule, regulation, or order under section 7194 of Title 42, and such additional period (not to exceed 12 calendar months) to commence a civil enforcement action; or

(F) of extension, to which the Secretary and the defendant have consent in writing, before the expiration of the time periods prescribed in subsection (a)(1) of this section.

(2) The provisions of subsection (a) of this section shall not affect or apply to any civil enforcement action commenced before, on, or after October 21, 1986, and remanded by the Office of Hearings and Appeals, the Federal Energy Commission, or the court for further action of any kind.

(3) The provisions of subsection (a) of this section shall not apply to any agency orders issued under the Acts or regulations described in subsection (a)(1) of this section or to regulations issued under this chapter, other than a proposed remedial order subject to this section.

(c) Expression of intent

(1) It is the intent of the Congress that—

(A) the Secretary and the Administrator of the Economic Regulatory Administration shall, to the greatest extent possible and within the time frames specified on September 12, 1986, by such Administrator to the Committee on Energy and Commerce of the House of Representatives, commence civil enforcement actions

with respect to all cases known by such Administrator as of October 21, 1986, and designated by such Administrator as "prelitigation cases," unless such an action is found not to be warranted;

(B) the Secretary and such Administrator not delay civil enforcement actions so as to cause the limitation in subsection (a)(1) of this section to apply to any such case;

(C) any negotiations for the purpose of settlement of alleged violations not delay the commencement of a civil enforcement action; and

(D) the Department of Justice cooperate in ensuring that activities necessary, including the enforcement of subpoenas, to commence civil enforcement actions are carried out in a timely manner.

(2) Any failure to comply with the time frames described in paragraph (1)(A) shall not be considered for any purpose in any administrative or judicial proceeding subsequently commenced.

(d) End of investigations and audits

Notwithstanding any other provisions of law, the Secretary shall not initiate, after January 1, 1987, any audit or investigation of alleged civil violations of the Acts or regulations described in subsection (a)(1) of this section for the purpose of commencement of any civil enforcement action. Nothing in this subsection shall affect or apply to any audit or investigation conducted with respect to any civil enforcement action commenced (within the limitation

established by subsection (a)(1) of this section) before, on, or after October 21, 1986. Nothing in this subsection shall limit the authority of the Secretary to continue any audit or investigation initiated before January 1, 1987.

FEDERAL COURTS ADMINISTRATION ACT
OF 1992

Sec. 102. Abolition of Temporary Emergency Court of Appeals

(a) APPEALS UNDER ECONOMIC STABILIZATION ACT—Section 211 of the Economic Stabilization Act of 1970 (Public Law 91-379; 84 Stat. 799) is amended by striking subsections (b) through (h) and inserting the following:

"(b) Appeals from orders or judgments entered by a district court of the United States in cases and controversies arising under this title shall be brought in the United States Court of Appeals for the Federal Circuit if the appeal is from a final decision of the district court or is an interlocutory appeal permitted under section 1292 (c) of title 28, United States Code."

(b) JUDICIAL REVIEW OF EMERGENCY ORDERS UNDER THE NATURAL GAS POLICY ACT—Section 506 (c) of the natural Gas Policy Act of 1978 (15 U.S.C. 3416 (c)) is amended—

(1) in the first sentence, by striking "the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970,. as amended," and inserting "the United States Court of Appeals for the Federal Circuit"; and

(2) by striking "Temporary Emergency Court of Appeals" each place it appears and inserting "United States Court of Appeals for the Federal Circuit."

(c) CONFORMING AMENDMENTS—Section 1295 (a) of title 28, United States Code, is amended—

(1) by striking "and" at the end of paragraph (9);

(2) by striking the period at the end of paragraph (10) and inserting a semicolon; and

(3) by adding at the end of the following new paragraphs:

"(11) of an appeal under section 211 of the Economic Stabilization Act or 1970;

"(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

"(13) of an appeal under section 506 (c) of the Natural Gas Policy Act of 1978; and

"(14) of an appeal under section 523 of the Energy Policy and Conservation Act."

(d) ABOLITION OF COURT—The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 is abolished, effective 6 months after the date of the enactment of this Act.

No. 02-207 (2)

Supreme Court, U.S.
FILED
SEP 13 2002
OFFICE OF THE CLERK

In the Supreme Court of the United States

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES INC., SAN DIEGO GAS AND ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, CHAMPION INTERNATIONAL CORPORATION, WESTVACO CORPORATION, AND WEYERHAUSER COMPANY,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT M. WESTBERG
Counsel of Record
CAROLINE N. MITCHELL
Pillsbury Winthrop LLP
50 Fremont Street
San Francisco, CA 94105
Mailing Address:
P.O. Box 7880
San Francisco,
CA 94120-7880
(415) 983-1356

Counsel for Respondent
Chevron U.S.A. Inc.

PILLSBURY WINTHROP LLP

Of Counsel

29 pp

QUESTIONS PRESENTED

1. Was the Federal Circuit required to write an opinion citable as precedent in affirming the judgment of the district court?

2. Did the Federal Circuit err in following precedent of the Temporary Emergency Court of Appeals ("TECA") that holds that only direct purchasers have standing to sue under § 210 of the Economic Stabilization Act ("ESA")[1] and that determines not to expand the statute while exercising jurisdiction under the savings clause?

3. Did the Federal Circuit err in following TECA precedent that applies the most closely analogous state law statute of limitations to actions brought under § 210 of the ESA?

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[1] Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743 (1971), last codified following 12 U.S.C. § 1904 note (1980).

CORPORATE DISCLOSURE STATEMENT

The parent corporations of respondent Chevron U.S.A. Inc., a corporation, are Texaco Exploration and Production Inc. and Texaco Inc., neither of which is a publicly held company. Texaco Inc. indirectly owns 100 percent of the stock of Texaco Exploration and Production Inc. Texaco Inc. in turn is indirectly wholly owned by ChevronTexaco Corporation, a publicly held corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Chevron U.S.A. Inc. ("Chevron") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Federal Circuit's decision in that court's docket No. 01-1565 on April 5, 2002.

STATEMENT OF THE CASE

The decision of the Court of Appeals affirms the district court's dismissal of petitioners' complaint against Chevron. The complaint sought damages from Chevron based on alleged overcharges in the price of crude oil under § 210 of the Economic Stabilization Act ("ESA").[2] The district court dismissed the action on the grounds that § 210 did not authorize the recovery of overcharges by indirect purchasers and that any such claims were time-barred. Petition Appx. at 5a-14a.

A. Statutory and Regulatory Background.

Domestic crude oil price and allocation controls were promulgated in the early 1970's pursuant to the ESA. The ESA expired by its own terms in 1974,[3] but portions of it were incorporated by reference into the Emergency Petroleum Allocation Act ("EPAA").[4] The controls were terminated by President Reagan in January 1981. The EPAA expired September 30, 1981, subject to a savings clause. Under § 211 of the ESA, as incorporated in the EPAA, appeals from the district courts of rulings on ESA issues were within the exclusive jurisdiction of the Temporary Emergency Court of Appeals ("TECA"), and are now within

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[2] Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743 (1971), last codified following 12 U.S.C. § 1904 note (1980).

[3] Economic Stabilization Act Amendments of 1973, Pub.L. No. 93-28, 87 Stat. 27 (1973).

[4] Pub.L. No. 93-159, 87 Stat. 628 (1973), codified as amended, but omitted, at 15 U.S.C. §§ 751-760.

the exclusive jurisdiction of the Federal Circuit.[5] The provision for exclusive appellate jurisdiction was intended "'to funnel into one court all appeals arising out of the District Courts and thus gain in consistency of decision.'" *Texas American Oil Corp. v. U.S. Department of Energy*, 44 F.3d 1557, 1562 (Fed.Cir. 1995), quoting S. Rep. No. 92-507, 92nd Cong., 1st Sess. 10, *reprinted* in 1971 U.S.C.C.A.N. 2283, 2292.

The statutory and administrative history of the ESA, the EPAA, TECA, and the administrative bodies responsible for enforcing the ESA and EPAA, was reviewed in 1996 by the Federal Circuit in *Phoenix Petroleum Co. v. U.S. F.E.R.C.*, 95 F.3d 1555, 1559-1563 (Fed.Cir. 1996).

During the time relevant to this proceeding, the regulations generally permitted different prices to be charged by crude oil producers depending upon the category or classification of the oil being sold, *e.g.*, "old" oil, "new" oil or "exempt" oil. Each domestic producer was required to certify the category of crude oil upon its first sale to a purchaser and provide such certification or a recertification within the two month period immediately following the month in which the sale was made. Former 10 C.F.R. § 212.131 (1980). Integrated petroleum companies, like Chevron, that generally did not sell their crude oil production to third parties but transferred it to their own refineries, nonetheless had to certify the category of oil transferred and report a "sale."

B. The Tertiary Incentive Program.

The Tertiary Incentive Program ("TIP") was a DOE program intended to encourage development of tertiary-enhanced crude oil projects. *Union Oil Co. of Cal. v. U.S.*

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[5] So provided in the Public Courts Administration Act of 1992, Pub.L. 102-572, § 102, 106 Stat. at 4506 (1992). Concurrently, 28 U.S.C. § 1295(a) was amended to add to the Federal Circuit's jurisdiction appeals under § 211 of the ESA and under § 5 of the EPAA.

Dept. of Energy, 688 F.2d 797, 800 (Temp.Emer.Ct.App. 1982). The TIP permitted a producer to recoup a portion of the expenses it had paid and reported in connection with a tertiary-enhanced recovery project. Former 10 C.F.R. 212.78(c) (1980). The recoupable portion of the expenses was known as "recoupable allowed expenses." *Ibid.*

The mechanism for recouping recoupable allowed expenses was that certain quantities of crude oil otherwise subject to price controls could be certified as released from controls and sold at exempt or market prices, provided that the "tertiary incentive revenue" from such sales did not exceed the recoupable allowed expenses attributable to that producer. Former 10 C.F.R. § 212.78(a)(2), 44 F.R. 51148 (1979). "Tertiary incentive revenue" meant in the case of first sales of crude oil the difference between the market-clearing price and the otherwise applicable ceiling price, less any *ad valorem* severance or windfall profit tax attributable to the excess. *Id.* at § 212.78(c). Under the regulations, the crude oil could be certified (or recertified) as exempt under the TIP within the two-month period following the month in which the oil was sold. 46 F.R. 12945, 12947 (Feb. 19, 1981); Former 10 C.F.R. § 212.78(c) (1980).

Integrated petroleum companies that did not sell crude oil to third parties but transferred it to their own refineries, did not receive money or benefit under the TIP except through an interrelated DOE program known as the Entitlements Program. *See* 49 F.R. 27410, 27416 (July 3, 1984).

C. The Entitlements Program.

The Entitlements Program was established to equalize among domestic refiners the benefits of access to lower-priced domestic crude oil. 39 F.R. 42246 (Dec. 4, 1974). An "entitlement" constituted the right to refine one barrel of price-controlled crude oil. Each refiner was allocated a number of entitlements equal to the number of barrels it refined ("runs to stills") multiplied by the percentage of price-controlled crude oil in the national crude-oil supply. Refiners that refined a disproportionately large share of

price-controlled crude oil were required to buy entitlements from refiners that refined a disproportionately small share in that month. Former 10 C.F.R. § 211.67(a)(1) (1980). Each month, the DOE assigned to refiners the obligations to buy or sell, and set the price of the entitlements, through a monthly list (the "Entitlements Notice") published during the *second month after* the transactions on which the computations were based.[6]

While the Entitlements Program operated, it was the mechanism for providing Tertiary Incentive benefits to integrated petroleum companies like Chevron that did not sell crude oil but transferred it to their own refineries. For such companies, the certification or recertification of crude oil under the TIP reduced the number of entitlements needed by the company's refining arm, thus increasing the number of entitlements the company could sell or reducing the number it needed to buy. However, in this case, following termination of price controls on January 28, 1981, DOE never published an Entitlements Notice for the month of January 1981 and no obligations to buy entitlements were imposed on any refiners with respect to crude oil that was refined in 1981. *Texaco Inc. v. Department of Energy*, 795 F.2d 1021 (Temp.Emer.Ct.App.).[7]

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[6] Contrary to the implications in the petition, the Entitlements Program, even when it operated fully, was not capable of passing on one refiner's costs in a given month to other refiners in the same month. There was always a "two-month lag," until the Entitlements Notice was issued.

[7] The petition repeatedly asserts that the Entitlements Program passed on to all refiners the increased cost of the crude oil that Chevron had delivered to its refineries in January 1981 and had subsequently recertified as exempt under the TIP. But because the DOE issued no Entitlements Notice for any period after December 31, 1980, no increases in crude oil costs related to Chevron's 1981 TIP recertifications were passed on to anyone by the Entitlements Program.

D. The Proposed Remedial Order Proceeding.

Chevron participated in the TIP in 1980 and 1981. Court of Appeals Appendix in 01-1565 ("Appx. 01-1565") at 24. After the end of price controls, Chevron recertified as exempt under the TIP a quantity of crude oil that had been delivered to Chevron's own refineries in January 1981. *Id.* at 25. As authorized by the TIP, the recertifications of the January 1981 oil were based on expenses incurred by Chevron for tertiary projects in February and March 1981, inventory purchased in February and March 1981 and windfall profit and state severance taxes attributable to the recertifications. Appx. 01-1565 at 25, 27 and 29.

Subsequently, in 1988, Chevron made available for non-tertiary use some of the prepaid goods and services on which the TIP recertifications were based. Chevron also recovered certain windfall profit taxes in a 1990 settlement with the Internal Revenue Service and received certain refunds of state severance taxes. *Id.* at 27, 29. Based on these events, in 1992, the DOE issued a proposed remedial order to Chevron alleging that Chevron had received excess revenue as a result of its participation in the TIP and that it should be required to disgorge that excess revenue, with interest. *See Chevron U.S.A. Inc.*, 25 DOE (CCH) ¶ 82,506 (1996). Petitioners, except for Westvaco Corporation, through their present counsel, participated formally in the DOE proceeding. Appx. 01-1565 at 104-108.

Contrary to the claim in the petition that DOE "abandoned" the proposed remedial order proceeding, Petition at 10, the DOE's Office of Hearings and Appeals ("OHA") held an evidentiary hearing, limited to the factual issue whether Chevron had received excessive revenue under the TIP. *Chevron U.S.A. Inc, supra,* 25 DOE (CCH) ¶ 82,506 at 85,016. Following that hearing, OHA ordered the proposed remedial order dismissed on the ground that the ERA "failed to establish the existence of a substantive violation requiring restitution on the part of Chevron." *Id.* at 85,018. Specifically, the OHA concluded:

--"[A]s a result of the termination of price controls and the non-issuance of the January [1981] Entitlements Notice, the incremental crude oil value reflected in [Chevron's] 1981 TIP recertifications was not passed on through [Chevron's] own prices or through other refiners by operation of the Entitlements Program." *Id.* at 85,028, footnote omitted.

--"[W]e find no 'unjust enrichment' or 'ill-gotten gains' on the part of Chevron. Moreover, since we find that there was no regulatory violation, there are no victims to be made whole in order to restore the *status quo ante*." *Id.* at 85,030.

--"Chevron was not unjustly enriched since the firm did not actually receive revenue in excess of its recoupable allowed expenses under TIP, and there was no injury to third parties as a result of the termination of price controls." *Id.* at 85,033.[8]

Several entities, including petitioners other than Westvaco, who hoped to share in any recovery by the DOE in its enforcement proceeding, then brought lawsuits challenging the decision not to issue a remedial order to Chevron. Those lawsuits resulted in rulings that the

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[8] In light of the termination of price controls and the non-issuance of the January 1981 Entitlements Notice, referenced in the OHA decision, the suggestion in the petition that the OHA has found in other cases that refined product purchasers such as petitioners paid to the refiners from whom they purchased oil products increases in the acquisition cost of crude oil by *any* refiner (*e.g.*, Petition at 6-7, 17) is simply irrelevant here, as well as incorrect. Those determinations concerned the pass-on of costs through the Entitlements Program. The Entitlements Program indisputably did not operate in this case. Conclusions in other cases as to pass-on of costs while the Entitlements Program was fully operating are not transferable to this case.

complaining entities did not have a right to judicial review of the DOE's determination not to issue a remedial order.[9]

E. The Proceedings Below.

Petitioners filed this action March 25, 1998 on behalf of themselves and other purchasers of oil products from refiners participating in the Entitlements Program who had asserted crude oil refunds in previous proceedings before the DOE. Appx. 01-1565 at 20. In the complaint, petitioners claim to have purchased oil products in January 1981 from "United States refiners." Appx. 01-1565 at 18-20, 29, ¶¶ 4-11, 37. There is no allegation that any petitioner purchased crude oil or any other product from Chevron. The complaint, which is largely drawn from the allegations in the DOE's proposed remedial order, recites that during January 1981 Chevron produced and refined a large quantity of crude oil that Chevron recertified as market-price crude oil under the TIP. Appx. 01-1565 at 24-25, ¶¶ 23, 24. As authorized by the TIP, Chevron's recertifications were based on expenses incurred and inventory purchased in February and March 1981. *Id.* at 25, ¶ 23. The complaint alleges that Chevron subsequently recovered some of the expenses that had been the basis for its TIP recertifications, and certain windfall profit tax and state severance tax refunds.

The complaint alleges that during January 1981 refiners generally, including Chevron, "correctly anticipated" their crude oil costs for that month "as they would be determined after implementation of the Entitlements Program two months subsequently, and specifically as they would be increased by virtue of implementation of TIP programs by

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[9] *See Consolidated Edison Co. of New York v. O'Leary,* 131 F.3d 1475 (Fed.Cir. 1997); *In re The Department of Energy Stripper Well Litigation,* 217 F.3d 851 (Fed.Cir. 1999) (dismissing appeals from the District Court for the District of Kansas); *In re The Department of Energy Stripper Well Exemption Litigation,* 206 F.3d 1345 (10th Cir. 2000) (dismissing appeals from the District Court for the District of Kansas and denying motions for transfer), *certiorari denied,* 531 U.S. 924 (2000).

refiners through March 1981," Appx. 01-1565 at 25-25, ¶¶ 25, 26, and that accordingly the recertification revenues reflected in Chevron's refining runs were the basis for the market prices for refined products sold in January 1981 by the refining industry, including Chevron, and were paid by end users of oil products. *Ibid.*[10]

Petitioners contend that they were overcharged for refined oil products purchased in January 1981

> to the extent to which such payments by them reflected an increase in the price of crude oil to refiners on the basis of anticipated payments of Windfall Profits Taxes and Severance Taxes by Chevron by virtue of the TIP recertification by Chevron as to crude oil refined by it in January 1981 which were later recovered by Chevron from the United States and the States.

Appx. 01-1565 at 29, ¶ 37.

The damages sought in the complaint are not related to prices that may have been paid by petitioners or ceiling prices. Rather, the complaint seeks a judgment awarding to petitioners a percentage share of the tax refunds or credits realized by Chevron in its 1990 windfall profit tax settlement with the United States and in severance tax settlements with various states, trebled under ESA § 210(b). *Id.* at 30, ¶¶ 39-40.

Chevron moved to dismiss the complaint based on TECA precedents holding that plaintiffs asserting claims under § 210 of the ESA must be direct purchasers of the petroleum products on which the overcharges were made, that the complaint failed to state a claim and that the action was

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[10] If any refiner actually "anticipated" increased future crude oil costs upon implementation in March 1981 of the January 1981 Entitlements Notice, such refiner's expectations were not met since, as noted, the January 1981 Entitlements Notice was never issued.

barred by the applicable statute of limitations. The district court dismissed the action, ruling that petitioners were without standing and that the action was barred by the statute of limitations (citing *Bond v. Texaco*, 647 F.Supp. 1135 (D.D.C 1986). The court noted that it "need not address" whether the complaint failed to state a claim. Petition Appx. at 6a n.2. The Federal Circuit affirmed in a per curiam order without opinion, designated as not to be cited as precedent. Petition Appx. 1a. Though Federal Circuit Rule 47.6(c) provides for the filing of requests to make an order precedential, petitioners filed no such request.[11]

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FEDERAL CIRCUIT WAS NOT REQUIRED TO WRITE AN OPINION CITABLE AS PRECEDENT IN AFFIRMING THE DISTRICT COURT.

Petitioners' assertion that the Federal Circuit's affirmance of the district court without opinion was used to avoid facing issues of first impression does not justify this Court's review. The circuit court's decision is expressly based on Federal Circuit Rule 36, set out at page 1a of the Appendix hereto, which permits a judgment of affirmance without opinion where the court has determined that an opinion would have no precedential value and has determined either that the record supports judgment on the pleadings or that the judgment was entered without error of law. Simply because the Federal Circuit did not think this case merited a written opinion is not a reason for review by this Court.

Nor is review warranted because the court designated its decision as not to be cited as precedent. Petitioners argue that the not-to-be-cited designation "impinges on the right to

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[11] Federal Circuit Rule 47.6 is set out in the Appendix hereto, page 2a.

appeal." Petition at 24. Petitioners nonetheless did not request, as they could have under Federal Circuit Rule 47.6, that the decision be made precedential.

A. Standing.

As to standing, the case below presented no issue of first impression.

Petitioners acknowledge the § 210 "requirement that a private cause of action is available only 'against any person renting property or selling goods or services who is found to have overcharged the plaintiff.'" Petition at 15. In *Gulf Oil Corp. v. Dyke,* 734 F.2d 797, 807-808 (Temp.Emer.Ct.App. 1984), TECA specifically held that ESA § 210 does not authorize recovery of overcharges by indirect purchasers. TECA also held, specifically in connection with that ruling, that it would not expand the scope of § 210 after the statute's expiration, while exercising jurisdiction under the savings clause:

> When Congress created the Temporary Emergency Court of Appeals as a "court of special and limited jurisdiction" which should "strictly construe [its] statutory grants of jurisdiction," it did not authorize recovery of overcharges by indirect purchasers. The EPAA expired by its own terms in September, 1981. *We will not expand the statute while exercising our jurisdiction under the savings clause.*

734 F.2d at 807-808, emphasis added, footnote omitted. Likewise, in *Stertz v. Gulf Oil Corp.,* 783 F.2d 1064 (Temp.Emer.Ct.App. 1986), a case involving crude oil overcharges, TECA pointed out without any qualification or limitation that "[o]nly direct purchasers have standing to sue under section 210." 783 F.2d at 1066 n.2.

The Federal Circuit, en banc, in *Texas American Oil Corp. v. U. S. Department of Energy,* 44 F.3d 1557, 1561 (Fed.Cir. 1995), adopted the body of law represented by TECA precedents.

Far from deciding an issue of first impression, the Federal Circuit simply followed TECA's refusal to expand the scope of § 210, more than 20 years after the statute expired.[12]

None of petitioners' arguments for not applying TECA's prior holdings in this case required the Federal Circuit to address the point in a written opinion.

Petitioners have now abandoned one of the standing arguments they asserted below, that the Entitlements Program made every United States refiner the "agent" of any producer-refiner whose crude oil costs reflected TIP-increased prices, so that a purchase from *any* refiner was a purchase from Chevron. Appx. 01-1565 at 17, 23. This theory, as the district court noted, has no factual basis or legal authority and is inconsistent with the position petitioners took before Judge Jackson in an earlier case, in which petitioners admitted that they were indirect purchasers. Petition Appx. at 10a, 9a. The argument did not require a written opinion of the circuit court.

Petitioners' principal arguments on standing were (and are) based on disregarding the fact that when the transactions at issue occurred, the DOE Entitlements Program was not operating to spread among refiners crude oil costs reported

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[12] Consistent with TECA's holdings, many other courts have also recognized that only direct purchasers may sue under § 210. *See, e.g., Atlantic Richfield Co. v. United States Dept. of Energy,* 618 F.Supp. 1199, 1212 (D.Del. 1985) (noting that in private enforcement action under § 210 "only a direct purchaser has standing to sue for violations of the regulatory provisions"); *State of Minnesota v. Standard Oil Co. (Indiana),* 568 F.Supp. 556, 566-567 (D.Minn. 1983) (dismissing all claims under § 210 by the State of Minnesota as indirect purchaser and recognizing that "§ 210(b) remains the exclusive remedy for overcharges. . . . Furthermore, . . . § 210(b) does not allow actions for indirect overcharges"); *Florida Power & Light Co. v. Belcher Oil Co.,* 82 F.R.D. 78, 80 (S.D. Fla. 1979) holding as to § 210 that "[t]here is no indication that suits were contemplated by anyone other than the immediate buyer against the immediate seller").

by Chevron as producer-refiner. *See, e.g.*, Petition at 6-7, 17-18, 21, 25-26. Thus, petitioners' argument that the Entitlements Program was the "functional equivalent" of a pre-existing "cost-plus" contract, so that the direct-purchaser rule should not apply, is completely destroyed by the fact that, as a result of the termination of price controls and the non-issuance of the January 1981 Entitlements Notice, no cost increases in any refiner's 1981 crude oil costs were passed on by the Entitlements Program. As a matter of law, and as the Federal Circuit was fully aware, the Entitlements Program ended without any entitlements obligations being issued for any period after December 31, 1980. Petitioners' bare allegation that the Entitlements Program was the "functional equivalent" of a cost plus contract did not, in the circumstances here, create an issue of first impression.[13]

The petition does not even mention petitioners' argument below that the refining industry had correctly "anticipated" crude oil costs for January 1981, as they would be determined after implementation of the Entitlements Program two months subsequently, and as they would be increased by implementation of TIP programs by refiners through March 1981. *See* Appx. 01-1565 at 25-26, ¶¶ 25, 26. This argument would shift the focus from the existence *vel non* of an overcharge as defined in § 210 (a charge in excess of a ceiling price) to the state of mind in January 1981 of each refiner in the country in settling prices for a multitude of refined products. While petitioner's argument

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[13] Even when the Entitlements Program fully operated, it was never the "functional equivalent" of a cost-plus contract, because refiners were not required to pass on increased crude oil costs in product prices. Former 10 C.F.R § 212.83(c)(e) (1980). Accordingly, the impact of cost increases was never "capable of determination in advance." *See Gulf Oil Corp. v. Dyke, supra,* 734 F.2d at 809, cited in the Petition at pages 25-26.

may be unique, it raises no issue of first impression in light of TECA's prior holdings.

Finally, petitioners' contention that exercise of this Court's supervisory powers is called for because the Court of Appeals did not honor "language," *i.e.*, dicta, of previous decisions, Petition at (i), 26-27, is also meritless. Petitioners, utilities and manufacturers, insist that TECA and the Federal Circuit found that "essentially the same Utilities and Manufacturers" were provided a remedy under ESA § 210 pursuant to which they could sue Chevron directly in a private cause of action.[14] In the cases relied upon, TECA and the Federal Circuit held no more than that bringing of enforcement actions under § 209 is the exclusive right of government, *Consolidated Edison*, 131 F.3d at 1479, that § 210 is the exclusive remedy for private litigants, *Consolidated Edison*, 117 F.3d at 544, and that government enforcement actions under § 209 are separate and distinct from actions of private entities under § 210 and private entities have no interest in public enforcement actions under § 209, *Getty*, 865 F.2d at 275-276. None of the cases relied upon presents an issue whether indirect purchasers may sue under § 210, which is the issue here.

B. Borrowing of the Most Analogous State Law Statute of Limitations.

The fact that the circuit court did not write an opinion on the statute of limitations issue likewise fails to justify review. TECA has repeatedly held that in actions brought under ESA § 210 the federal courts will apply the most analogous state law statute of limitations. *Ashland Oil Co. of California v. Union Oil Co. of California*, 567 F.2d 984 (Temp. Emer.Ct.App. 1977); *Gulf Oil Corporation v. Dyke*, 734 F.2d

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[14] Petition at 26-27, citing *Consolidated Edison Co. of New York v. O'Leary*, 131 F.3d 1475 (Fed.Cir. 1997), *Consolidated Edison Co. of New York v. O'Leary*, 117 F.3d 538 (Fed.Cir. 1997) and *Getty Oil Co. v. Department of Energy*, 865 F.2d 270 (Temp.Emer.Ct.App. 1988).

797, 808 (Temp.Emer.Ct.App. 1984). While TECA did not address whether the federal statute of limitations for suits by the DOE under the Petroleum Overcharge Distribution and Restitution Act ("PODRA"), 15 U.S.C. § 4504, may apply to a § 210 action, federal courts, as the district court pointed out, continued to apply the most analogous state statutes of limitation after PODRA was enacted. Petition Appx. at 11a-12a.

The Federal Circuit was not required to write an opinion addressing whether the PODRA statute of limitations established for actions by the DOE pursuant to ESA § 209 should apply to private actions brought under § 210. While petitioners may be correct that no court decision specifically addresses that issue, TECA and the Federal Circuit had consistently distinguished between § 209 and § 210 actions. *See, e.g., Consolidated Edison,* 131 F.3d at 1479. Congress expressly limited the reach of the PODRA statute of limitation to actions brought "by the Secretary"; petitioners submitted no authority suggesting that Congress intended to alter the rule of borrowing for § 210 actions. The implication in the petition that every argument of counsel must be addressed in an appellate opinion is not supported by authority.

II. THE FEDERAL CIRCUIT'S DECISION CAN HAVE ONLY LIMITED APPLICATION BEYOND THIS CASE.

The petition should also be denied because the Federal Circuit's decision can have only limited application beyond this case. Petitioners' argument that the decision constitutes an "emasculation" of the private cause of action under § 210 is unfounded. The decision does not change the scope of § 210 in any respect and is consistent with TECA's determination 15 years ago not to expand the statute.

As to the statute of limitations, petitioners themselves suggest an intent on the part of Congress, when it enacted PODRA in 1986, to not provide a limitation period for § 210 actions, because it viewed such actions as "unlikely to be

brought" (Petition at 20), five years having then elapsed since deregulation. It has now been over *20 years* since deregulation. Given the consistency of court rulings applying state law statutes of limitations of less than six years to § 210 actions, this Court may presume that those who might have had such claims have already asserted them. In any event, there is no basis for assuming that, nearly a generation after expiration of price controls, the choice of a statute of limitations for private actions under the expired statute can be of great importance.

III. THE FEDERAL CIRCUIT'S DECISION IS CORRECT.

The petition for certiorari should be denied because the Federal Circuit's decision is correct. Petitioners do not contend that TECA's prior holdings that only direct purchasers may sue under § 210 are wrong. They only argue that those holdings should not apply in this case. As we have shown above, there is no plausible basis for any such conclusion because the Entitlements Program, on which petitioners rely, did not operate to spread any possible impact of Chevron's TIP recertifications to any other refiner. There is thus no basis for contending that the direct purchaser rule, which has uniformly been applied in § 210 cases, should be dispensed with because this case involves crude oil.

The suggestion in the petition that petitioners, because they have been awarded distributions from DOE recoveries in § 209 enforcement proceedings, somehow have standing to maintain a private action under § 210, is also without support. The DOE distributes a portion of its crude oil overcharge recoveries from § 209 cases to individual claimants under the so-called "Subpart V" proceedings, *see* 10 C.F.R. § 205. Because of the impossibility of tracing the impact of crude oil overcharges to specific purchasers, DOE distributes the bulk of its crude oil overcharge

recoveries under ESA § 209 to the state and federal governments as "indirect restitution." *Ibid.*[15]

The Federal Circuit is also correct as to the applicable statute of limitations. Petitioners have abandoned the claim, urged below, that the 3-three year statute of limitations had not run.[16] Nor have petitioners challenged the conclusion that the "most analogous" statute of the District of Columbia is at most three years under D.C. Code Ann. § 12-301 (5), (7) and (8). Rather, they now confine their argument to urging that the limitation period specified in 1986 for § 209 enforcement actions brought "by the Secretary" should apply to private actions under § 210. Hence, the fact that courts in earlier cases may have had to choose among several possible statutes is not a basis for review here, where no such issue is presented.

As noted above, petitioners contend that Congress, by not providing a statute of limitations for § 210 actions when it enacted PODRA in 1986, "presumably reflected a view that such actions were unlikely to be brought." Petition at 20. The argument suggests nothing so much as a specific intent by Congress to leave the law unchanged for then remaining § 210 actions.

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[15] The petition mischaracterizes the Report to the Court in *In re The Department of Energy Stripper Well Exemption Litigation*, 653 F.Supp. 108 (D.Kan. 1986), in arguing that it demonstrates that entities such as petitioners in this case paid to refiners from whom they purchased oil products increases in the crude oil costs of *any* refiner (Petition at 6-7). Contrary to the petition, the *Stripper Well* Judge read the Report as concluding that it is "impossible to trace directly the impact of the [*Stripper Well*] overcharges." 653 F. Supp. at 110-111.

[16] Petitioners had intervened in the DOE enforcement proceedings against Chevron in July 1992, demonstrating that there was adequate information available at that time to determine whether there was a basis for litigation. The instant suit was not filed until March 1998.

This Court pointed out in *Lampf, Pleva, Lipkind, Prupius & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991), that the practice of borrowing the state law statutes of limitations "has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'"

The assumption that Congress, when it enacted PODRA in 1986, intended to continue to borrow state law in § 210 cases is particularly compelling here, where the appellate court vested with exclusive appellate jurisdiction had repeatedly applied the borrowing doctrine in § 210 cases and where Congress was well aware of that history but carefully limited the PODRA statute of limitations to actions "by the Secretary." 15 U.S.C. § 4504(a)(3). Had Congress desired to express a policy that private parties should no longer be subject to state statutes of limitations, it knew how to say so.

Moreover, while *Lampf* permits borrowing from federal law, it is a "closely circumscribed exception" (*Lampf*, 501 U.S. at 356), limited to only those situations where the rule from federal law "clearly provides a closer analogy than available state statutes," *ibid., and* when the federal policies at stake and the practicalities of litigation "make that rule a significantly more appropriate vehicle for interstitial lawmaking," *ibid.* The examples cited in *Lampf* where borrowing from federal law was permitted were situations where operation of a state limitations period would "frustrate the policies embraced by the federal enactment," 501 U.S. at 356, or the state rules were "at odds" with the purpose or operation of federal substantive law. *Ibid.* These conditions are not remotely present here. TECA has consistently held that state statutes of limitation with durations of three years or less are not inconsistent with national energy policy. TECA pointed out 18 years ago in *Gulf Oil Co. v. Dyke, supra*, 734 F.2d 797, that it had already held that "[a] *two-year* statute is certainly not inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio*." 734 F.2d 808, quoting *Johnson Oil*

Co. v. DOE, 690 F.2d 191, 196 (Temp.Emer.Ct.App. 1982), emphasis added.

In arguing that the PODRA 6-year statute is a "closer fit" with § 210 actions than state law, petitioners ignore the overwhelming body of law emphasizing the separate statutory remedies under § 209 and § 210. In this connection, petitioners' claim that upon the end of price controls § 209 actions were converted to damage actions seeking the same damages as would be sought in a § 210 action (Petition at 19-20) is grossly mistaken. In enforcement cases under § 209, the government primarily seeks disgorgement, whether or not there is proof of injury to particular parties. The en banc decision in *Texas American Oil Corporation v. United States Department of Energy, supra,* 44 F.3d .2d at 1569, says it all: the acknowledged public purpose of § 209 prosecutions "is to remedy unjust enrichment of the wrongdoer, not to 'make whole' those persons who were overcharged." Because it is not possible to identify the extent of any individual injury, PODRA authorizes payment to the public treasuries--state and federal--of the bulk of disgorgement recoveries. Thus "the DOE is charged with enforcing 'public, not private rights, *Texas American* at 1571. The portion of § 209 recoveries that that are set aside to pay individual claims are not distributed based on findings that individual parties sustained particular damages but are distributed under DOE-administered "Subpart V" proceedings, based on presumptions originally designed to ease the burden on an applicant claiming to have been injured. *See Goodyear Tire & Rubber Co. v. Department of Energy,* 118 F.3d 1531, 1537 (Fed.Cir. 1997). Section 210 plaintiffs, by contrast, are seeking to enforce private rights. Their claims under § 210 require proof of individual injury.

Moreover, Congress's provision in PODRA of a statute of limitations for § 209 actions "by the Secretary" was unrelated to any consideration relevant to a § 210 action. The legislative history of 15 U.S.C. § 4504 established that Congress was concerned with bringing down the curtain on agency enforcement actions. The legislation was neither

directed at nor concerned with private actions. At the time the legislation was enacted, there was a backlog of agency cases and Congress was concerned that "long after the termination of controls, there are many cases still in the prelitigation stage." *See* H. Rep. No. 99-727, 99th Cong., 2d Sess. (1986) *reprinted* in 1986 U.S.C.C.A.N. 3607, 3879. The legislative history demonstrates that there were a number of factors that had contributed to delay in the prosecution of agency cases, including lack of adequate resources at the Department of Energy. *Id.* In adopting a statute of limitations for the first time for government enforcement actions Congress had to take into account the ability of the DOE to move forward on all of its cases. *Id.* There is accordingly no basis for an argument that Congress intended to change the law applicable to § 210 actions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. WESTBERG
Counsel of Record
CAROLINE N. MITCHELL
Pillsbury Winthrop LLP
50 Fremont Street
San Francisco, CA 94105
Mailing Address:
P.O. Box 7880
San Francisco, CA 94120
(415) 983-1356

Counsel for Respondent
Chevron U.S.A. Inc.

PILLSBURY WINTHROP LLP
50 Fremont Street
San Francisco, CA 94105
(415) 983-1000

Of Counsel

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APPENDIX

Federal Circuit Rule 36

Rule 36. Entry of Judgment - Judgment of Affirmance Without Opinion

The court may enter a judgment of affirmance without opinion citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

(a) the judgment decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence supporting the jury's verdict is sufficient;

(c) the record supports summary judgment, directed verdict, or judgment on the pleadings;

(d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law.

Federal Circuit Rule 47.6

Rule 47.6. Opinion and Order of the Court

(a) **Disposition of Appeal, Motion, or Petition; Precedential Effect.** Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A disposition may be cited as precedent of the court unless it is issued bearing a legend specifically stating that the deposition may not be cited as precedent.

(b) **Nonprecedential Opinion or Order.** An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like based on a decision of the court designated as nonprecedential.

(c) **Request to Make an Opinion or Order Precedential; Time for Filing.** Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential. An original and 6 copies of the request must be filed with the court. The request will be considered by the panel that rendered the disposition. The requestor must notify the court and the parties of any case that person knows to be pending that would be determined or affected by reissuance as precedential. Parties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond. If the request is granted, the opinion or order may be revised as appropriate.

(d) **Public Records.** All dispositions by the court in any form will be in writing and are public records.